

§ 1.6038A-1T

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shareholders. Sales transactions occur between USS and FS. Applying the rules of this section, USS is a reporting corporation. It is determined that USS and FS are each controlled by FP under section 482 and the regulations thereunder. Therefore, FS is related to USS within the meaning of section 482 and is a related party to USS. Accordingly, the sales transactions between USS and FS are subject to section 6038A.

Example 6. The facts are the same as in *Example 5*, except that the remaining 75 percent of FS is owned by one shareholder that is unrelated to the FP group and it is determined that FS is not controlled by FP for purposes of section 482. Under these facts, FS is not a related party of either FP or USS. Accordingly, section 6038A does not apply to the sales transactions between FS and USS.

Example 7. P, a U.S. multinational, is a holding company that wholly owns X, a U.S. operating company, which in turn wholly owns FS, a controlled foreign corporation. Applying the rule of section 318(a)(3)(C), FS is deemed to own the stock of X that is actually held by P. However, under the rules of paragraph (e) of this section, X will not be a reporting corporation by reason of section 318.

(n) *Effective dates*—(1) *Section 1.6038A-1.* Paragraphs (c) (relating to the definition of a reporting corporation), (d) (relating to the definition of a related party), (e)(1) (relating to the application of section 318), and (f) (relating to the definition of a foreign person) of this section are effective for taxable years beginning after July 10, 1989. The remaining paragraphs of this section are effective December 10, 1990, without regard to when the taxable year began.

(2) [Reserved] For further guidance, see § 1.6038A-1T(n)(2).

(3) *Section 1.6038A-4.* Section 1.6038A-4 (relating to the monetary penalty) is generally effective for taxable years beginning after July 10, 1989, for the failure to file Form 5472. For the failure to maintain records or the failure to produce documents under § 1.6038A-4(f)(2), the section is effective December 10, 1990, without regard to when the taxable year to which the records relate began.

(4) *Section 1.6038A-5.* Section 1.6038A-5 (relating to the authorization of agent requirement) is effective December 10, 1990, without regard to when the taxable year to which the records relate began.

(5) *Section 1.6038A-6.* Section 1.6038A-6 (relating to the failure to furnish infor-

mation under a summons) is effective November 6, 1990, without regard to when the taxable year to which the summons relates began.

(6) *Section 1.6038A-7.* Section 1.6038A-7 (relating to the noncompliance penalty adjustment) is effective December 10, 1990, without regard to when the taxable year began.

[T.D. 8353, 56 FR 28061, June 19, 1991; T.D. 8353, 56 FR 41792, Aug. 23, 1991, as amended by T.D. 9161, 69 FR 55500, Sept. 15, 2004; T.D. 9456, 74 FR 38875, Aug. 4, 2009; T.D. 9529, 76 FR 33999, June 10, 2011]

§ 1.6038A-1T General requirements and definitions (temporary).

(a) through (n)(1) [Reserved] For further guidance see § 1.6038A-1(a) through (n)(1).

(2) *Section 1.6038A-2.* Section 1.6038A-2 (relating to the requirement to file Form 5472) generally applies for taxable years beginning after July 10, 1989. However, § 1.6038A-2 as it applies to reporting corporations whose sole trade or business in the United States is a banking, financing, or similar business as defined in § 1.864-4(c)(5)(i) applies for taxable years beginning after December 10, 1990. Section 1.6038A-2(d) and (e) apply for taxable years ending on or after June 10, 2011. For taxable years ending prior to June 10, 2011, see § 1.6038A-2(d) and (e) as contained in 26 CFR part 1 revised as of September 15, 2004.

(n)(3) through (n)(6) [Reserved] For further guidance see § 1.6038A-1(n)(3) through (6).

(o) *Expiration date.* The applicability of this section expires on June 10, 2014.

[T.D. 9529, 76 FR 33999, June 10, 2011, as amended at 76 FR 36996, June 24, 2011]

§ 1.6038A-2 Requirement of return.

(a) *Form 5472 required*—(1) *In general.* Each reporting corporation as defined in § 1.6038A-1(c) (or members of an affiliated group filing together as described in § 1.6038A-1(k)) shall make a separate annual information return on Form 5472 with respect to each related party as defined in § 1.6038A-1(d) with which the reporting corporation (or any group member joining in a consolidated Form 5472) has had any reportable transaction during the taxable

year. The information required by section 6038A and this section must be furnished even though it may not affect the amount of any tax due under the Code.

(2) *Reportable transaction.* A reportable transaction is any transaction of the types listed in paragraphs (b) (3) and (4) of this section. However, if neither party to the transaction is a United States person as defined in section 7701(a)(30) and the transaction—

(i) Will not generate in any taxable year gross income from sources within the United States or income effectively connected, or treated as effectively connected, with the conduct of a trade or business within the United States, and

(ii) Will not generate in any taxable year any expense, loss, or other deduction that is allocable or apportionable to such income, the transaction is not a reportable transaction.

(b) *Contents of return*—(1) *Reporting corporation.* Form 5472 must provide the following information in the manner the form prescribes with respect to each reporting corporation:

(i) Its name, address (including mailing code), and U.S. taxpayer identification number; each country in which the reporting corporation files an income tax return as a resident under the tax laws of that country; its country or countries of organization, and incorporation; its total assets for U.S. reporting corporation; the places where it conducts its business; and its principal business activity.

(ii) The name, address, and U.S. taxpayer identification number, if applicable, of all its direct and indirect 25-percent foreign shareholders (for an indirect 25-percent foreign shareholder, explain the attribution of ownership); each country in which each 25-percent foreign shareholder files an income tax return as a resident under the tax laws of that country; the places where each 25-percent shareholder conducts its business; and the country or countries of organization, citizenship, and incorporation of each 25-percent foreign shareholder.

(iii) The number of Forms 5472 filed for the taxable year and the aggregate value in U.S. dollars of gross payments as defined in § 1.6038A-1(h)(2) made with

respect to all foreign related party transactions reported on all Forms 5472.

(2) *Related party.* The reporting corporation must provide information on Form 5472, set forth in the manner the form prescribes, about each related party, whether foreign or domestic, with which the reporting corporation had a transaction of the types described in paragraphs (b) (3) and (4) of this section during its taxable year, including the following information:

(i) The name, U.S. taxpayer identification number, if applicable, and address of the related party.

(ii) The nature of the related party's business and the principal place or places where it conducts its business.

(iii) Each country in which the related party files an income tax return as a resident under the tax laws of that country.

(iv) The relationship of the reporting corporation to the related party.

(3) *Foreign related party transactions for which only monetary consideration is paid or received by the reporting corporation.* If the related party is a foreign person, the reporting corporation must set forth on Form 5472 the dollar amounts of all reportable transactions for which monetary consideration (including U.S. and foreign currency) was the sole consideration paid or received during the taxable year of the reporting corporation. The total amount of such transactions, as well as the separate amounts for each type of transaction described below, must be reported on Form 5472, in the manner the form prescribes. Where actual amounts are not determinable, a reasonable estimate (as described in paragraph (b)(6) of this section) is permitted. The types of transactions described in this paragraph are:

(i) Sales and purchases of stock in trade (inventory);

(ii) Sales and purchases of tangible property other than stock in trade;

(iii) Rents and royalties paid and received (other than amounts reported under paragraph (b)(3)(iv) of this section);

(iv) Sales, purchases, and amounts paid and received as consideration for the use of all intangible property, including (but not limited to) copyrights,

designs, formulas, inventions, models, patents, processes, trademarks, and other similar intangible property rights;

(v) Consideration paid and received for technical, managerial, engineering, construction, scientific, or other services;

(vi) Commissions paid and received;

(vii) Amounts loaned and borrowed (except open accounts resulting from sales and purchases reported under other items listed in this paragraph (b)(3) that arise and are collected in full in the ordinary course of business);

(viii) Interest paid and received;

(ix) Premiums paid and received for insurance and reinsurance; and

(x) Other amounts paid or received not specifically identified in this paragraph (b)(3) to the extent that such amounts are taken into account for the determination and computation of the taxable income of the reporting corporation.

Amounts required to be reported under paragraph (b)(3)(vii) of this section shall be reported as monthly averages or outstanding balances at the beginning and end of the taxable year, as the form shall prescribe.

(4) *Foreign related party transactions involving nonmonetary consideration or less than full consideration.* If the related party is a foreign person, the reporting corporation must provide on Form 5472 a description of any reportable transaction, or group of reportable transactions, listed in paragraph (b)(3) of this section, for which any part of the consideration paid or received was not monetary consideration, or for which less than full consideration was paid or received. A description required under paragraph (b)(4) of this section shall include sufficient information from which to determine the nature and approximate monetary value of the transaction or group of transactions, and shall include:

(i) A description of all property (including monetary consideration), rights, or obligations transferred from the reporting corporation to the foreign related party and from the foreign related party to the reporting corporation;

(ii) A description of all services performed by the reporting corporation

for the foreign related party and by the foreign related party for the reporting corporation; and

(iii) A reasonable estimate of the fair market value of all properties and services exchanged, if possible, or some other reasonable indicator of value.

If, for any transaction, the entire consideration received includes both tangible and intangible property and the consideration paid is solely monetary consideration, the transaction should be reported under paragraph (b)(3) of this section if the intangible property was related and incidental to the transfer of the tangible property (for example, a right to warranty services.)

(5) *Additional information.* In addition to the information required under paragraphs (b) (3) and (4) of this section, a reporting corporation must provide on Form 5472, in the manner the form prescribes, the following information:

(i) If the reporting corporation imports goods from a foreign related party, whether the costs taken into account in computing the basis or inventory cost of such goods are greater than the costs taken into account in computing the valuation of the goods for customs purposes, adjusted pursuant to section 1059A and the regulations thereunder, and if so, the reasons for the difference.

(ii) If the costs taken into account in computing the basis or inventory cost of such goods are greater than the costs taken into account in computing the valuation of the goods for customs purposes, whether the documents supporting the reporting corporation's treatment of the items set forth in paragraph (b)(5)(i) of this section are in existence and available in the United States at the time Form 5472 is filed.

(6) *Reasonable estimate*—(i) *Estimate within 25 percent of actual amount.* Any amount reported under this section is considered to be a reasonable estimate if it is at least 75 percent and not more than 125 percent of the actual amount.

(ii) *Other estimates.* If any amount reported under this paragraph (b) of this section fails to meet the reasonable estimate test of paragraph (b)(6)(i) of this section, the reporting corporation nevertheless may show that such amount is a reasonable estimate by making an

affirmative showing of relevant facts and circumstances in a written statement containing a declaration that it is made under the penalties of perjury. The District Director shall determine whether the amount reported was a reasonable estimate.

(7) *Small amounts.* If any actual amount required under this section does not exceed \$50,000, the amount may be reported as “\$50,000 or less.”

(8) *Accrued payments and receipts.* For purposes of this section, a reporting corporation that uses an accrual method of accounting shall use accrued payments and accrued receipts for purposes of computing the total amount of each of the types of transactions listed in this section.

(c) *Method of reporting.* All statements required on or with the Form 5472 under this section and § 1.6038A-5 shall be in the English language. All amounts required to be reported under paragraph (b) of this section shall be expressed in United States currency, with a statement of the exchange rates used.

(d) [Reserved] For further guidance, see § 1.6038A-2T(d).

(e) [Reserved] For further guidance, see § 1.6038A-2T(e).

(f) *Exceptions—(1) No reportable transactions.* A reporting corporation is not required to file Form 5472 if it has no transactions of the types listed in paragraphs (b) (3) and (4) of this section during the taxable year with any related party.

(2) *Transactions solely with a domestic reporting corporation.* If all of a foreign reporting corporation’s reportable transactions are with one or more related domestic reporting corporations that are not members of the same affiliated group, the foreign reporting corporation shall furnish on Form 5472 only the information required under paragraphs (b) (1) and (2) of this section, if the domestic reporting corporations provide the information required under paragraphs (b) (3) through (5) of this section. Such a foreign reporting corporation nonetheless is subject to the record maintenance requirements of § 1.6038A-3 and the requirements of §§ 1.6038A-5 and 1.6038A-6. The name, address, and taxpayer identification number of each domestic reporting cor-

poration that provided such information must be indicated on Form 5472 in the space provided for the information under paragraphs (b) (1) and (2) of this section.

(3) *Transactions with a corporation subject to reporting under section 6038.* A reporting corporation is not required to make a return of information on Form 5472 with respect to a related foreign corporation for a taxable year for which a U.S. person that controls the foreign related corporation makes a return of information on Form 5471 that is required under section 6038 and this section, if that return contains information required under § 1.6038-2(f)(11) with respect to the reportable transactions between the reporting corporation and the related corporation for that taxable year. Such a reporting corporation also is not subject to §§ 1.6038A-3 and 1.6038A-5. It remains subject to the general record maintenance requirements of section 6001.

(4) *Transactions with a foreign sales corporation.* A reporting corporation is not required to make a return of information on Form 5472 with respect to a related corporation that qualifies as a foreign sales corporation for a taxable year for which the foreign sales corporation files Form 1120-FSC.

(g) *Filing Form 5472 when transactions with related parties engaged in by a partnership are attributed to a reporting corporation.* If transactions engaged in by a partnership are attributed under § 1.6038A-1(e)(2) to a reporting corporation, the reporting corporation need report on Form 5472 only the percentage of the value of the transaction or transactions equal to the percentage of its partnership interest. Thus, for example, if a partnership buys \$1000 of widgets from the foreign parent of a reporting corporation whose partnership interest in the partnership equals 50 percent of the partnership interests (and the remaining 50 percent is held by unrelated parties), the reporting corporation must report \$500 of purchases from a foreign related party on Form 5472.

(h) *Effective/applicability date.* Except as otherwise provided, for applicability dates for this section for certain reporting corporations, see § 1.6038A-1(n). Paragraph (b)(8) of this section applies

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with respect to information for annual accounting periods beginning on or after June 21, 2006.

[T.D. 8353, 56 FR 28063, June 19, 1991, as amended by T.D. 9113, 69 FR 5932, Feb. 9, 2004; T.D. 9161, 69 FR 55500, Sept. 15, 2004; T.D. 9268, 71 FR 35526, June 21, 2006; T.D. 9338, 72 FR 38476, July 13, 2007; T.D. 9529, 76 FR 33999, June 10, 2011]

§ 1.6038A-2T Requirement of return (temporary).

(a) through (c) [Reserved] For further guidance, see § 1.6038A-2(a) through (c).

(d) *Time for filing returns.* A Form 5472 required under this section must be filed with the reporting corporation's income tax return for the taxable year by the due date (including extensions) of that return.

(e) *Untimely filed return.* If the reporting corporation's income tax return is untimely filed, Form 5472 nonetheless must be timely filed. When the reporting corporation's income tax return is ultimately filed, a copy of Form 5472 must be attached.

(f) through (h) [Reserved] For further guidance, see § 1.6038A-2(f) through (h).

(i) *Expiration date.* The applicability of this section expires on June 10, 2014.

[T.D. 9529, 76 FR 33999, June 10, 2011, as amended at 76 FR 36996, June 24, 2011]

§ 1.6038A-3 Record maintenance.

(a) *General maintenance requirements—*

(1) Section 6001 and section 6038A. A reporting corporation must keep the permanent books of account or records as required by section 6001 that are sufficient to establish the correctness of the federal income tax return of the corporation, including information, documents, or records ("records") to the extent they may be relevant to determine the correct U.S. tax treatment of transactions with related parties. Under section 6001, the District Director may require any person to make such returns, render such statements, or keep such specific records as will enable the District Director to determine whether or not that person is liable for any of the taxes to which the regulations under part I have application. See section 6001 and the regulations thereunder. Such records must be permanent, accurate, and complete, and must clearly establish income, deductions,

and credits. Additionally, in appropriate cases, such records include sufficient relevant cost data from which a profit and loss statement may be prepared for products or services transferred between a reporting corporation and its foreign related parties. This requirement includes records of the reporting corporation itself, as well as to records of any foreign related party that may be relevant to determine the correct U.S. tax treatment of transactions between the reporting corporation and foreign related parties. The relevance of such records with respect to related party transactions shall be determined upon the basis of all the facts and circumstances. Section 6038A and this section provide detailed guidance regarding the required maintenance of records with respect to such transactions and specify penalties for noncompliance. Banks and other financial institutions shall follow the specific record maintenance rules described in paragraph (h) of this section.

(2) *Safe harbor.* A safe harbor for record maintenance is provided under paragraph (c) of this section, which sets forth detailed guidance concerning the types of records to be maintained with respect to related party transactions. The safe harbor consists of an all-inclusive list of record types that could be relevant to different taxpayers under a variety of facts and circumstances. It does not constitute a checklist of records that every reporting corporation must maintain or that generally should be requested by the Service. A specific reporting corporation is required to maintain, and the Service will request, only those records enumerated in the safe harbor (including material profit and loss statements) that may be relevant to its business or industry and to the correct U.S. tax treatment of its transactions with its foreign related parties. Accordingly, not every item listed in the safe harbor must be maintained by every reporting corporation. A corporation that maintains or causes another person to maintain the records listed in paragraph (c)(2) of this section that may be relevant to its foreign related party transactions and to its business or industry will be deemed to have met